91-433

Supreme Court, U.S.
FILED
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No.

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1991

FLETCHER J. CAMPBELL,

Petitioner,

vs.

MICHAEL ALLEN SCHWARTZ, Grievance Administrator, State of Michigan Attorney Grievance Commission,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE MICHIGAN SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

FLETCHER J. CAMPBELL

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Petitioner In Pro Se

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER OR NOT THE MICHIGAN SCHEME OF ATTORNEY DISCIPLINE, IN WHICH THE MICHIGAN SUPREME COURT DELEGATES ITS DISCIPLINARY AUTHORITY TO THE ATTORNEY DISCIPLINE BOARD, IS UNCONSTITUTIONAL.

II. WHETHER OR NOT THE PROSECUTION ALTERATION, CHANGING AND TAMPERING WITH EVIDENCE SECURED SECRETLY DURING THE PRE-FORMAL COMPLAINT STAGE IS VIOLATIVE OF THE UNITED STATES CONSTITUTION OR SHOULD RESULT IN DISMISSAL OF THE PROSECUTION OF THE PETITIONER UNDER THE INHERENT SUPERVISORY POWERS OF THE COURT TO DETER SUCH FUTURE ACTS.

III. WHETHER OR NOT PETITIONER WAS DENIED A FAIR TRIAL WHERE UNEXCISED EVIDENCE WAS ENTERED IN THE TRIAL AND ON THE RECORD OF A CLEARLY HEARSAY NATURE WHICH REASONABLY AFFECTED THE JUDGMENT AGAINST THE PETITIONER.

IV. WHETHER OR NOT FORMAL COMPLAINT ADB 25-88 SHOULD HAVE BEEN DISMISSED TO ENSURE DUE PROCESS WHERE THE PANEL DID NOT HOLD A PUBLIC HEARING WITHIN THE PRESCRIBED FIFTY-SIX DAYS.

V. WHETHER OR NOT THE PETITIONER'S CONSTITUTIONAL RIGHTS WERE DENIED WHERE SEPARATE AND DISTINCT FORMAL COMPLAINTS WERE CONSOLIDATED, DISCOVERY OUTSIDE THE SCOPE OF THE RULES WAS ALLOWED TO THE PROSECUTION, AND A HYBRID HEARING FORMAT OF AN UNPRECEDENTIAL NATURE WAS ESTABLISHED BY THE BOARD.

VI. WHETHER OR NOT THE PETITIONER'S CONSTITUTIONAL RIGHTS WERE DENIED WHERE ACCESS TO THE MINUTES OF THE BOARD AND THE MASTER'S LIST UNDERLYING THE APPOINTMENT OF A MASTER WAS DENIED.

LIST OF ALL PARTIES TO THE PROCEEDING

State of Michigan Attorney Discipline Board[1]

State of Michigan Attorney Grievance Commission[2]

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[1] The Attorney Discipline Board is the adjudicative arm of the Michigan Supreme Court for discharge of its exclusive constitutional responsibility to supervise and discipline Michigan Attorneys [Michigan Court Rules, ("MCR") Rule 9.110(A)]. Except as provided by MCR 9.120 [i.e. conviction of a criminal offense] a Complaint begins a formal proceeding [MCR 9.115(B)].

[2] The Attorney Grievance Commission is the prosecution arm of the Michigan Supreme Court for discharge of its constitutional responsibility to supervise and discipline Michigan Attorneys [MCR 9.108].

PARTIES (con'd)

Michigan Supreme Court[3]

Frank J. Kelly, Esq.
Attorney General State of Michigan[4]

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[3] The Michigan Supreme Court is given the exclusive power under Michigan Statutes [e.g., Revised Judicature Act, Mich Comp Laws Ann §600.910 (West 1981)]. The Revised Judicature Act ["RJA"] conforms with Article 6, paragraph 1 of the Michigan Constitution, which declares that the entire judicial power of the state is vested exclusively in one Court of justice [Mich Const. Art.6 §1]. The Michigan Supreme Court has delegated its disciplinary power to the Attorney Discipline Board [See, supra note 1], a non-judicial body which is an independent authority created by the Michigan Supreme Court that is totally autonomous [MCR 9.107 (B)]. The position of Grievance Administrator is created by MCR 9.109(A). Nevertheless, the Attorney Discipline Board's decision is absolutely final [MCR 9.110(D)] and, unless leave to appeal is granted, the Michigan Supreme Court does not hear the case, and disbarment is final without judicial intervention.

[4] Frank J. Kelly is the Attorney General for the State of Michigan. His name and department is listed in these proceedings before this Honorable Court because the constitutionality of Michigan Statute(s) is drawn in question, and his department is not a party. In accordance with 28 U.S.C. §2403(b) the initial pleading, or paper before this Honorable Court may be applicable and shall be served upon the Attorney General of the State [Sup. Ct.R., Rule 29.4(c)].

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CONCISE STATEMENT OF GROUNDS ON WHICH JURISDICTION IS INVOKED

On March 22, 1991, the Michigan Supreme Court entered its Order denying the Petitioner leave to appeal from the final Order of the Attorney Disciplinary Board ["Board"] dated February 28, 1991.

On May 31, 1991 The Michigan Supreme Court entered its Order denying the Petittioner's Motion For Reconsideration of the Order denying leave to appeal.

The statutory provision(s) believed to confer on this Court jurisdiction to review the judgement or decree by Writ of Certiorari is as follows:

28USC §451 [Sup.Ct.R. 29,4(c)][5]

28USC §1257(a)

28USC §2101(c) [Sup.Ct.R. 13.1]

28USC §2403(b) [Sup.Ct.R. 29.4(c)]

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[5] As as was noted in List of All Parties To The Proceeding, supra, note 4 the Attorney General of the state of Michigan is not a party. To the Petitioner's knowledge no Court has certified that the constitutionalty of statute(s) of the state was drawn in question.

42USC §1981

42USC §1983

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED[6]

UNITED STATES CONSTITUTION:

AMENDMENT XIII.

§1. Slavery Abolished

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

AMENDMENT XIV.

§1. Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

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[6] In accordance with Sup.Ct.Rule 14.1(f) the pertinent text is set forth in the appendix pursuant to subparagraph 1(k) of Sup.Ct. Rule 14 where necessary

AMENDMENT V.

Capital crimes; double jeopardy; self-incrimination; due process; just compensation for property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATE OF MICHIGAN CONSTITUTION of 1963:

ARTICLE 6 - JUDICIAL BRANCH

§1. Judicial power in court of justice; divisions

Sec. 1. The judicial power of the state is vested exclusively in one court of justice which shall be divided into one supreme court, one court of appeals, one trial court of general jurisdiction known as the circuit court, one probate court, and courts of limited jurisdiction that the legislature may establish by a two-thirds vote of the members elected to and serving in each house.

§5. Court rules; distinctions between law and equity; master in chancery

Sec. 1. The Supreme Court shall be general rules establish, modify, amend and simplify the practice and procedure in all courts of this state. The distinction between law and equity pro-

ceedings shall, as far as practicable, be abolished. The office of master in chancery is prohibited.

ARTICLE 1 - DECLARATION OF RIGHTS

§2. Equal protection; discrimination

Sec. 2. No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin. The legislature shall implement this section by appropriate legislation.

§17. Self-incrimination; due process of law; fair treatment at investigations

Sec. 17. No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. The right of all individuals, firms, corporations and voluntary associations to fair and just treatment in the course of legislative and executive investigations and hearings shall not be infringed.

MICHIGAN STATUTES:

600.910 Admission to bar; discipline; venue [MCLA]

Sec. 910. The supreme court and each circuit court has jurisdiction to admit to the bar of this state, persons who possess the required qualifications, to disbar or suspend members of the bar for misconduct, and to reinstate licenses to practice law. All such matters and proceedings are declared to be civil in nature, and the venue thereof is subject to regulation by the supreme court. P.A.

1961, No.236, §910, Eff.Jan.1, 1963.

MCLA 600.2146

MICHIGAN RULES OF PROFESSIONAL CONDUCT ["MRPC"]

MRPC 3.3(a)(1)-(4)
MRPC 3.4(a)-(b)
MRPC 3.8(d)
MRPC 8.4(a)-(c)

MICHIGAN COURT RULES ["MCR"]

MCR 2.203(B)
MCR 2.312
MCR 2.504(B)(2)
MCR 2.505(A)
MCR 2.505(B)

MCR 7.210(I)-(J)
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MCR 8.121(B)
MCR 8.303[7]

CONCISE STATEMENT OF MATERIAL FACTS TO CONSIDERATION OF QUESTIONS PRESENTED

On February 17, 1988, Michael Alan Schwartz, Grievance Administrator, State of Michigan Attorney Grievance Commission [hereinafter "Respondent"] filed a Formal Complaint against Fletcher J. Campbell (P11544) [herein-

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[7] MCR 8.303 effective March 1, 1985 replaced and is based on PCR 908.3 and now requires approval of attorney fees even when the affected parties have consented.

after "Petitioner"] containing six counts.[8] Petitioner on March 16, 1988 filed his Answer To Formal Complaint, together with his Affirmative Defenses and Demand For Reply.

The hearing on Formal Complaint No. ADB 25-88 was scheduled to commence on April 7, 1988 at 9:30 A.M. before the Wayne County Hearing Panel #21 consisting of three (3) attorneys . This April 7, 1988 scheduled hearing was not held because the Respondent, seven (7) days after commencing the first Formal Complaint, filed a Motion To Adjourn on February 24, 1988, which was objected to by the Petitioner, and a new date set for April 29, 1988 before Panel #21.

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[8] Count I alleges misconduct in violation of MCR 9.104(1)-(4) and DR 1-102(A)(1)(5)(6); DR 6-101(A)(3); and DR 7-101(A)(1)-(3), while Count II alleges violation of MCR 9.104(1)-(4) and DR 1-102(A)(1)(4)-(6); DR 2.106(A) and (B). In Count III, the Respondent alleged violation of MCR 9.104 (1)-(4); and DR 1-102(A) (1)(5)(6), and DR 7-106(A), while Count IV alleges violation of MCR 9.104(1)-(4) and DR 1-102(A)(1)(4)-(6). Count IV(sic) alleges violation of MCR 9.104(1)-(4) and DR 1-102(A)(1)(4)-(6), while Count VI alleged violation of MCR 9.104(1)-(4) and DR 1-102(A)(4)-(6).

On April 15, 1988 Petitioner filed a Motion For Summary Disposition And/Or Dismissal of Formal Complaint ADB 25-88 because a "public hearing" was not held within the prescribed 56 days on this Formal Complaint as was/is mandated under Michigan Court Rule 9.111(B) (App.96-97; Powers and Duties).[9] The "public hearing" scheduled for April 29, 1988 was not held by the Attorney Discipline Board [hereinafter "Board"] as previously scheduled.

On May 25, 1988, Respondent filed another Formal Complaint against the Petitioner arising out of a separate occurrence, transaction and event. This latter Complaint was a three (3) count complaint designated ADB

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[9] "App." refers to the Appendix filed in accordance with the Rules of the Supreme Court of the United States ["Sup.Ct.R."], Rule, 14.1(f), 14.1(h) and/or 14.1(k)(v); the first numeral thereafter refers to the numercial order/arrangement of appendices.

133-88[10]

Less than one (1) day later, May 26, 1988 at 10:02 A.M., an Administrative Order/ Letter issued consolidating ADB 25-88 and ADB 133-88 under the signature of the Board's Secretary/Clerk, together with Formal Complaint ADB 133-88 and Consolidation Notice of Hearing setting hearing on both Complaints for July 13, 1988 before new Panel #11 members.

On July 11, 1988, pursuant with Petitioner's discovery demand in accordance with MCR 9.115(F)(4), the Respondent, at its office, disclosed certain documents that they intended to use at the hearing on ADB 133-88 and copies of same were made and provided by Respondent to Petitioner which included Exhibit No. 78

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[10] Count I alleges misconduct in violation of MCR 9.104(1)-(4) and DR 1-102(A)(1)(3)-(6); DR 9-102(A); and DR 9-102(B)(4), while Count II alleges violation of MCR 9.104(1)-(4) and DR 1-102(A) (4)-(6). In Count III, the Commission alleges violation of MCR 9.104(1)-(4)(6) and DR 1-102 (A)(1)(4)-(6).

["Ex"][11].

Prior to the convened July 13, 1988 scheduled hearing before Panel #11 certain dispositive motions were made by both parties in each case.

On July 13, 1988 the parties were heard on various motions. On September 7, 1988 further arguments on motions were had.

On October 27, 1988 Panel #11 issued its Order Granting Request For Admission to Respondent, and denied Petitioner's Motion To Strike Request. As a part of this latter Order each of the motions for Summary Disposition filed by each of the parties were taken under advisement for decision by Panel #11.

On December 23, 1988 an Order appointing a Master was entered by the Board, and served upon the parties.

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[11] "Ex" where used refers to Exhibits which make up the records in this cause introduced by the parties and used by the Master and Panel #11; the first numeral thereafter refers to the number of the exhibit, the latter the transcript page.

On January 31, 1989 Petitioner filed a Motion For Relief From Order Appointing Master. The Board issued its Order Staying Proceedings pending further consideration of the latter motion. Subsequently the Board issued its Order denying the Petitioner's relief requested, and set the matter down for further proceedings on May 8, 1989 before Master Kaplan.

On May 8, 1989 the appointed Master, Steven M. Kaplan, an Assistant Prosecuting Attorney for the county of Macomb, state of Michigan, proceeded to hear the testimony of the witnesses, which was spread over five (5) days and was concluded on July 24, 1989.

On November 10, 1989 the Report Of The Master was docketed with the Board (App.26-74; Report Of The Master), and mailed to Petitioner and Respondent the same day.

Essentially the Report Of The Master sets forth Findings Of Fact and Conclusions Of Law with respect to each separate count contained in each Formal Complaint. Moreover, under Form

Complaint Number ADB 25-88, being a six (6) count complaint the Master as a matter of law concluded as follows:

> "[Petitioner] committed professional misconduct in the following ways:
>
> 1. By collecting a $600.00 non-refundable retainer fee without obtaining either the approval of the Probate Court or the affected parties (as required by Probate Court Rule 908.3), in violation of DR 2-106(A), and (B), and MCR 9.104 (1-4).
>
> 2. By charging and, without having the approval of the Probate Court or the affected parties (as required by PCR 908.3), collecting a clearly excessive fee; a one-third contingency fee, in violation of DR 2-106(A) and (B), and MCR 9.104(1-4).
>
> 3. By violating an Order and Opinion of the Michigan Court of Appeals which directed him to take steps to reimburse the Irwin Estate for excessive fees that he received, in violation of DR 7-106 (A), DR 1-102(A)(5), and MCR 9.104(1-4).
>
> 4. By knowingly violating an Order of the Wayne County Probate Court, dated February 1, 1985, which enjoined him from transferring or spending funds that he received through the Irwin Estate, in violation of DR 7-106(A), DR 1-102(A)(5), and MCR 9.104 (1-4)."

Under Formal Complaint ADB 133-88, being a three (3) count complaint the Master as a matter of law concluded as follows:

> "[Petitioner] committed professional

misconduct in the following ways:

1. By failing or neglecting to deposit the funds of a client, Shirley Wright, which he obtained through the collection of a judgment, in an identifiable bank account, in violation of DR 9-102(A), DR 1-102(A) (4-5), and MCR 9.102 (1-4).

2. By misappropriating the funds of a client, Shirley Wright,, in violation of DR 9-102(A), DR 1-102(A) (4-5), and MCR 9.102(1-4).

3. By knowingly providing false information to a Volunteer Investigator assigned by the Attorney Grievance Commission to investigate a grievance filed against Respondent, in violation of DR 1-102(A)(4-5) and MCR 9.103(3)(4)(6)."

On March 1, 1990 Wayne County Hearing Panel #11 filed its Report (App.14-25; Report of Wayne County Hearing Panel #11), and entered its Order (App.81-85; Order Of Revocation) arising out of its continuing, joint and simultaneous exercise of power and jurisdiction over these proceedings together with the Master.

The Petitioner herein sought timely review of Panel #11's Order of Revocation with the Board and also petitioned for a stay of the Order of Revocation. The Board by its Order granted a stay.

On October 25, 1990 the Board, on review, entered its Order reducing discipline (App.79-80; Order Reducing Discipline), together with its Opinion (App.4-13; Board Opinion).

Essentially the Board concluded that a reduction to a suspension of three (3) years was warranted, but held that it was not persuaded that any phase of the proceedings had been compromised because of the constitutional or procedural defects in that such defects do not constitute "prejudicial irregularity" or "an error resulting in a miscarriage of justice". (Opinion, p.2, para.2)

On November 12, 1990 the Petitioner filed his Motion For Reconsideration and sought a stay pending decision on the request for reconsideration by the Board. On November 15, 1990 the Board entered its order granting the stay of discipline.

On February 28, 1991 the Board entered its supplement to Order denying Motion For Reconsideration (App.77-78; Supplement Order). Since the Board's decision is absolutely

final[12] and the only way to seek review is through a Leave To Appeal to the Michigan Supreme Court, Petitioner on March 14, 1991 timely sought such Leave To Appeal. Since Leave To Appeal was not granted (App.76; Order of Michigan Supreme Court [03-22-91]), the Michigan Supreme Court never heard the case, and the three (3) year discipline imposed was final without judicial intervention.

Petitioner on April 12, 1991 timely filed his Motion For Reconsideration Of The Order Denying Leave To Appeal. On May 31, 1991, the Michigan Supreme Court entered its Order denying reconsideration (App.75; Order of Michigan Supreme Court [05-31-91]), and refused judicial intervention thus rendering the decision of the Board as final.[13]

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[12] MCR 9.110(D)(4)-(6) (App.94-96)

[13] Any other summary, pertinent quotation of record, etc. required by Sup.Ct.R. 14.1(h), given that review is being sought of a judgment of a State Court, is set forth in Appendix evidencing that the federal question(s) were timely and properly raised. See, also Sup.Ct.R. 14.1(k)

Petitioner seeks review on Certiorari to this Honorable Court timely.

DIRECT AND CONCISE ARGUMENT FOR ALLOWANCE OF WRIT OF CERTIORARI

The Attorney Discipline Board ["Board"] in reaching its final decision without judicial intervention by the Michigan Supreme Court indicated that "(t)he Board is not persuaded that any phase of these proceedings have been compromised by a prejudicial irregularity or an error resulting in a miscarriage of justice". The Board "liberally construed" the constitutions, statutes, court rules and case-law with respect to the procedural defects of constitutional proportions that existed on whole record, including the exercise of power that exceeded the scope of the Board's authority. Of course, since the Michigan Supreme Court did not hear the case, the improvident actions of the Master, Panel #11 or the Board was placed beyond reproach and judicial intervention even though the Michigan Supreme Court had the exclusive constitutional responsibil-

ity to supervise and discipline Michigan attorneys. Simply stated, there was absolutely no judicial intervention because the Michigan Supreme Court delegated its judicial powers to the Board which is totally autonomous and independent, and this Michigan scheme is actively in conflict with the state constitution itself. Michigan Constitution Article 6 §1. The United States Supreme Court expressly stated that the right of an attorney to practice law is one of which he may be deprived only by judgement of the Court. Garland, 71 U.S. at 371 [decided on the basis of an act of Congress regulating attorneys] This right is given to the attorney by a solemn judicial act of the Court. In re Integration of Nebraska State Bar Association, 133 Neb 283; 275 NW265, 267 (1937), quoted in In re Integration of the State Bar of Oklahoma, 85 Okla 505, ___; 95 P 2d 113, 114 (1939) In the Nebraska decision, the Court stated that "agencies" may be utilized in disbarment proceedings for fact-finding purposes and for

preparing recommendations, as long as they have no power of final decision. 133 Neb at 287, 275 NW at 268. The scheme of attorney discipline was reviewed by the United States Supreme Court in Middlesex County Ethics Committee -vs- Garden State Bar Association, 102 S. Ct.2515 (1982). Unlike the Michigan Supreme Court, the New Jersey Supreme Court makes the final decision on discipline.

Although, as far back as medieval times, attorneys have faced the threat of being completely stripped of the ability to engage in the practice of law [In 1292, the King of England gave the judiciary the power to disbar attorneys. In re Day, 181 Ill 73; 54 NE646 (1899)], and may be justified, it is ironic that the person who takes an oath to uphold the law and the constitution could be the same person who is denied, as in the instant case, the constitutional protection of a judicial hearing in the disciplinary proceeding instituted against them. The power to disbar is uniformly vested in the highest Court of each

state, as is the power to grant a license. Because the authority to discipline attorneys lies within the powers of the state Courts, attorney discipline is an exercise of judicial power. This presumption is crucial in determining whether the delegation of the power to disbar sustains the unconstitutional delegation of judicial power. The Michigan scheme of attorney discipline, in which the Michigan Supreme Court delegates its disciplinary authority to the Attorney Discipline Board for final decision, unavoidably raises the important and pressing issue of unconstitutional delegation of authority under the Michigan Constitution and the United States Constitution.

Moreover, the powers to admit attorneys to the bar, to suspend them, to disbar them, and to reinstate their licenses [Mich Comp Laws Ann §600.910 (West 1981)] constitute purely judicial functions of the Court. While it is true that the Respondent may contend that the scheme vesting attorney discipline in

the Michigan Supreme Court is based on strong legal foundations [e.g. People -vs- Stanley, 344 Mich 500; 75NW2d39 (1956); In re Emmons, 330 Mich 303; 47NW 2d620 (1951); In re Salzbury, 217 Mich 260; 47NW404 (1922)], and in its constitutional power to promulgate Court rules in the discharge of its obligations [e.g. Mich.Court. Art.6, §5; Perin -vs- Peular, 373 Mich 531; 130 NW2d4(1964)(Supreme Court has exclusive power to enact judicial rules of practice and procedure)], it is also true that those same foundations limit the Michigan Supreme Court's authority to delegate its exclusive disciplinary power to the Attorney Discipline Board, a non-judicial body. The Michigan scheme is actively in conflict with the state constitution, Mich.Const.Art.6 §1 (emphasis added) which provides:

> The judicial power of the state is vested exclusively in one court of justice, which **shall be divided into one supreme court, one court of appeals, one trial court of general jurisdiction known as the circuit court, one probate court and court of limited jurisdiction**, that the legislature may establish by two-thirds

vote of the membership elected to and serving in each house.

The New Jersey Constitution, unlike the Michigan Constitution, expressly gives to the New Jersey Supreme Court the administration of discipline of attorneys. See, N.J.Const., Art.VI. §2 The location of the power to make the final decision is the main difference between the New Jersey scheme of discipline recently reviewed by the Unites States Supreme Court in Middlesex County Ethics Committee -vs- Garden State Bar Association, supra. This difference, and the fact that under Michigan's system the Board may disbar the attorney, places Michigan in the minority. Only six (6) states allow the judgement on disbarment to be delegated by the state Supreme Court to the hearing committee or disciplinary board [i.e. these states are: Alabama, Michigan, Mississippi, North Carolina, Virginia and Wisconsin (as of 1980). M. Shoaf, State Disciplinary Enforcement System, Structural Survey (1980) [Comparison of attorney disci-

pline proceedings in the fifty states).]

As this Honorable Court mandated in Middlesex County Ethics Committee, 102 S.Ct. 2515 (1982), Petitioner herein has pointedly raised the constitutional challenge in the state proceeding, and, therefore, this Honorable Court ought **not** further abstain from adjudicating questions of attorney discipline and the Writ of Certiorari should be allowed.

Further, in In re Summers, 325 U.S.561 (1945), the United States Supreme Court stated that even though the proceedings to admit an attorney to the bar are declared non-judicial, the actual act of admission or the act of revocation of the license was declared an exercise of judicial power, "a judgement", and a "ministerial act which is performed by virtue of the judicial power".[14] On the basis of its

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[14] In Summers the Supreme Court reviewed Illinois state law. This opinion, however, was accepted as applicable to all jurisdictions in Doe -vs- Pringle, 550 F.2d 596 (10th Cir. 1976). Since the power to disbar is an implication of the power to admit to the bar, both of these functions are of the same type, and In re Summers is applicable to the discussion of disbarment.

own hearing, the Attorney Discipline Board exercises its determination, which is the final judgement in disciplinary proceedings. This disbarment judgement of the Board is therefore an exercise of judicial power. The Michigan position on this issue [See, Underwood -vs- McDuffee, 15 Mich 361 (1867)] was no different under the rule of Saier [293 F.2d at 756], in which the disbarment was declared a judicial function of the Supreme Court. There is absolutely no constitutional provision which sustains an exception to the nondelegability of judicial power under Chandler -vs- Nash, 5 Mich 409 (1858). Obviously, the Michigan Supreme Court did not grant leave to appeal to the Petitioner herein or hear the matter, because the Court was reluctant to invalidate its own Court rules or decisions on constitutional grounds. It, i.e. Michigan Supreme Court, simply chose to look the other way. This duty to discipline was found to be nondelegable to committees or representatives

in many states.[15] It is to be noted that among the six (6) states which allow an agency to render the final decision on disbarment [See, M.Shoaf, supra, pp. 4-5] **only** Michigan and North Carolina do **not** grant the aggrieved attorney any possibility of appeal to the Court as a matter of right. The appeal by leave system of review does not come close to fulfilling the role of a Supreme Court's final decision required by the Michigan Constitution in disbarment proceedings. The operation of the Michigan Attorney Discipline Board is manifestly unconstitutional and allowance of Writ of Certiorari should issue from this Honorable Court to remedy the situation concerning the state action of a proscribed nature. There needs to be adherence to the nondelegation doctrine. As a matter of fact,

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15 In re Integration of Nebraska State Bar Association, 133 Neb 283; 275 NW265, 267 (1937), quoted in In re Integration of the State Bar of Oklahoma, 85 Okla 505, _____; 95P2d 113, 114 (1939) Both opinions emphasize the meaning of the final decision in disbarment for the issue of delegation of judicial power and its constitutionality.

as recent as 1980 Justice Rehnquist of this Honorable Court has sought to breathe life into the nondelegation doctrine. E.g., Industrial Union Department -vs- American Petroleum Institute, 448 U.S.607, 673-676; 100 S.Ct. 2844, 2879-2881; 65 L.Ed.2d 1010 (1980) (Rehnquist, J., concurring in judgement) The foundation of the doctrine, as many have demonstrated [e.g. J. Ely, Democracy and Distrust: A Theory of Judicial Review, 131-134 (1980)], is very sound. The Michigan Supreme Court ought not be permitted to duck its responsibility for judicial intervention in disciplinary proceedings while acting under the color of law.

Aside from the above-stated argument for allowance of Writ of Certiorari within the context of the unconstitutional delegation of judicial power to the Board in these proceedings by the Michigan Supreme Court, certain constitutionally independent and/ or subsidiary arguments are hereinafter made seriatim for allowance of Writ of Certiorari.

First, the Respondent's tampering with, alteration and changing of a document, i.e. Ex 78-1213 (Tr.1208), secured by the Respondent-prosecution secretly during Pre-Formal Complaint stage under the sponsorship and authority of MCR 9.114(C)(1), constitute conduct violative of the due process clause of the Fourteenth Amendment of the United States Constitution or alternatively constitutes conduct which should have caused a dismissal of the Formal Complaint under the inherent supervisory powers of the Court to deter such future acts by the Respondent-prosecutor's and cause them to act with due regard for the integrity of the administration of justice.

During the testimony of Respondent's witness, Mary H. Sanders, it was brought to the attention of the Master that a document secured by the Respondent during the Pre-Formal Complaint stage from Mary H. Sanders' employer National Bank of Detroit, had been altered, deleted and changed intentionally by the Respondent and introduced into evidence.

(Tr. 1207 thru 1211)

It should be noted that this document (i.e. Ex.78-1213) (Tr.1208) was secretly secured by the Respondent, without notice or knowledge of the Petitioner under the sponsorship of MCR 9.114 (C)(1) during the Pre-Formal Complaint stage by a subpoena issued to National Bank of Detroit for the production of their business records covering on the Petitioner and those corporate banking accounts he had with the bank. The subpoena practice utilized by the Administrator, Respondent and its Prosecutors have been permitted by the Michigan Supreme Court heretofore. See, Anonymous -vs- Attorney Grievance Commission, 430 Mich 241; 422 NW2d 648 (1988) However, Petitioner hastens to add that though such practice has been upheld by the Michigan Supreme Court during the Pre-Formal Complaint stage, nevertheless such allowance ought not be viewed as a license, grant or permission for the Respondent-subpoenaor receiving such secret documents to subsequently alter, delete

or change the business records produced, and then offer the same intentionally into evidence as substantive evidence well knowing that the same has been in fact altered, tampered with and changed to provide an advantage to the Respondent.

Moreover, the subpoenaed records of National Bank of Detroit while possibly admissible at trial under MCLA 600.2146, MRE 803 (6), it still does not provide a vehicle to permit the prosecution to legally alter, change, modify or delete certain information provided, and then place it into evidence in its tampered with or altered form. Pure and simple, this action constitute an abuse of the Pre-Formal Complaint subpoena power. Thus, since the Michigan Supreme Court has opined that pre-complaint subpoenas are available under Anonymous, supra, any abuse of such subpoena power is subject the Fourteenth Amendment's due process clause of the United States Constitution or the inherent supervisory power of this Honorable Court.

The Respondent's actions, in tampering with, altering or concealing such document from the Master, in and of itself, constitutes a clear violation of the Michigan Rules of Professional Conduct ["MRPC"] Rules, 3.4(a)-(b); 3.3(a)(1)-(4); 3.8(d) and 8.4 (a)-(c).[16]

Such action, in presenting altered subpoenaed evidence to the Court, should require dismissal of the charges against the Petitioner, or at least a new trial, for prosecutorial misconduct in suppressing the evidence secured secretly and without notice during the Pre-Formal Complaint.

Petitioner hastens to call the Court's attention to another aspect of the judicial system that is being forgotten in reference to such proscribed use. Where such deceitful conduct is undertaken by the prosecutors it makes a mockery of the judicial process. Flagrant prosecutorial conduct requires less of a showing of prejudice by the Defendant.

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[16] Rules Adopted Effective October 1, 1988.

United States -vs- Bryant, 142 U.S. App DC 132, 138 (1971); 439 F.2d.642, 648.

Hence, even under variable standards being used to determine "intentional suppression", where the prosecution has deliberately suppressed evidence which is favorable to the defense, prejudice will be presumed. United States -vs- KEOGH, 391 F.2d.138 (CA2, 1968).

In United States -vs- Estepa, 471 F.2d. 1137 (2nd Cir., 1972), the Second Circuit not only reversed a Defendant's conviction, but expressly gave instructions to the District dismiss the indictment, because the Grand Jury had been misled. It is submitted that, in the case at bar, the course followed by the prosecutor makes a mockery of the United States Constitution; Amendments V and VI and the Michigan Constitution (1963), Article I. §§17 and 20.

What we have in the case at bar is a clear case of a need to deter prosecutorial misconduct and safeguard the judicial process. Moreover, intent to deceive the Court author-

izes the invalidation of a prosecution. United States -vs- Luna, 525 F.2d.4. (6th Cir. 1975), Cert.Den 424 U.S. 965 (1976).

Federal Appeal Courts have affirmed District Courts' dismissal of indictments where Courts have concluded that the prosecution's conduct has placed in jeopardy the integrity of the criminal justice system, even where no perjury has been alleged, but the Court believed that the prosecutor's behavior has exceeded the limits of acceptability. United States -vs- Samango, 607 F.2d at 884, (9th Cir., 1979).

Here in the case at bar, the prosecutor's acts in altering and subsequently seeking to suppress the evidence given to it by a witness secretly under MCR 9.114(C)(1) has failed to comport with "fastidious regard for the honor of the administration of justice" as quoted in Communist Party -vs- Subversive Activities Control Board, 351 U.S. 115 (1956).

As Judge Hufstedler wrote in her concurring opinion in United States -vs- Basurto,

497 F.2d.781, (9th Cir., 1974):

> "An important function of our supervisory power is to guarantee that Federal prosecutors act with due regard for the integrity of the administration of justice." 497 F.2d at 793.

The power of the Court to dismiss an indictment for prosecutorial misconduct, on the basis of its supervisory powers was reaffirmed in United States -vs- Owens, 580 F.2d.365 (9th Cir., 1978):

> "Under its inherent supervisory powers, a Federal Court is empowered to dismiss an indictment on the basis of governmental misconduct... As such, dismissal is used as a prophylactic tool for discouraging future deliberate governmental impropriety of a similar nature." 580 F.2d at 367.

Second, the Petitioner was denied a fair trial where the Respondent, without excising documentary evidence as ordered by the Master, caused clearly hearsay evidence to be entered in the trial and record over the objection of the Petitioner. Such unexcised evidence reasonably affected the judgement of the Master, Panel #11 and the Board.

In connection with another pre-complaint

undertaking by the Respondent and its Prosecutor, a Mr. Ronald Karp, Esq. was told by the Respondent to investigate the Request For Investigation filed by Mrs. Shirley Wright in accordance with MCR 9.114(A) (Tr.961). As a part of Mr. Karp's investigation he compiled a "report" and gave it to the Respondent and its Prosecutors. No copy was provided to the Petitioner during this pre-complaint stage, nor was the same available to the public. MCR 9.126(A) (Tr.963)(Ex. 56-963)

During the prosecution of Petitioner, on July 10, 1989, Respondent had attempted to introduce into evidence the Report Mr. Karp testified that he submitted to the Respondent on July 13, 1987. (Tr.963, 965) Petitioner vehemently objected to the admissibility of proposed Exhibit "56", save though statements purportedly made by the Petitioner to the Respondent's investigator, Mr. Karp. (Tr.965, 966)

Mr. Karp merely testified as to what was told to him by Petitioner at one meeting. He

never testified that he was misled in any fashion. Likewise the Respondent presented no other person from the Grievance Commission to testify that they were fraudulently "induced" to do anything by the statements of Petitioner one way or the other in connection with the Grievance Commission's actions in session or out. (Tr.960-992)

The Respondent did not obey the ruling on Exhibit "56", but instead failed and refused to excise the hearsay, and then proceeded to place the whole of Exhibit "56" in the record without excision which included totally hearsay comments "made by other people". The whole of the report, placed in the record contrary to the Master's Order, was read by the Master, Panel #11 and the Board in reaching its decision, and did or may have reasonably contributed to their adverse decision in this matter.

The inclusion in the record of the hearsay and extra judicial statements of others such as Mrs. Wright and Mr. Taylor, inter

alia, voids the misconduct finding in this action [i.e. #133-88] irrespective of the good faith or bad faith of the prosecution in that such action by the Respondent violated not only the rules of evidence, but also the due process clause of the Fourteenth Amendment of the United States Constitution.

Third, the Order of discipline should have been vacated on Formal Complaint ADB 25-88 to ensure due process itself where (1) the Panel did not "hold a public hearing" on the Formal Complaint within fifty-six (56) days, and (2) the fifty-six (56) day rule cannot be disregarded by a Panel or Board as being considered a "goal" only.

Moreover, MCR 9.111(B), in its pertinent part, explicitly states:

> "**(B) Powers and Duties.** A hearing panel shall do the following:
>
> (1) Hold a public hearing on a complaint.... assigned to it within 56 days after the date the complaint is filed with the board ..." [Emphasis Added]

Put simply, the Panel herein did not hold a "public hearing" on the Complaint within

fifty-six (56) days as required. The rule, if it is to have any validity or any force and effect, must be complied with to satisfy due process itself.

Further, the use of the word "shall" in the rule makes it mandatory. To hold otherwise will result in a miscarriage of justice and would be prejudicial to the Petitioner.

Petitioner's Motion For Dismissal was filed with the Board and served on each Panel member and Respondent on or about April 16, 1988 after the 56 day period had run.

The threshold issue whether the panel held a public hearing on the complaint within fifty-six (56) days. Petitioner respectfully contends that the panel did not. To reach this conclusion the meaning "hearings" must be examined. Moreover, MCR 9.126 refers to "Open Hearings". To further explain what are "open hearings", sub-rule 9.126(B) is instructive where it pointedly states in part material:

> "**HEARINGS.** Hearings before a hearing panel.... must be open to the public, ..." [Emphasis Supplied] See, MCR 9.126(B)

Hence it is clear that no hearing "open to the public" was held by the panel within fifty-six (56) days of February 17, 1988. Further it is to be noted that MCR 9.111(B)(1) clearly states that the "hearing" contemplated under this operable fifty-six (56) day rule is a "public hearing", as distinct from a private action of a panel which would render such rule meaningless. Put simply, the panel is without authority to disregard the mandate of the fifty-six (56) day rule for to do so denies the Petitioner due process itself. See, similarly, United States -vs- Crane, 776 F.2d. 600 (6th Cir. 1985)

Beyond doubt disciplinary proceedings are quasi-criminal in character although it is not necessary to observe all of the rules of criminal law in such proceedings. See, State Bar -vs- Freid, 388 Mich 711, 715 (1972) citing State Bar -vs- Woll, 387 Mich 154, 161 (1972). Hence due process must be accorded the Petitioner.

Given that these proceedings are quasi-

criminal in nature [In Re Clink, 117 Mich 619 (1898)], and "punishment" of revocation was imposed against the Petitioner as an outgrowth of ADB No. 25-88, it is only fitting that the 56 day Rule not be dealt with lightly. Put another way, these proceedings, as well as the "punishment" imposed by Panel #11, are "severe and highly penal" [Matter of Hamilton Baluss, 28 Mich 507, 508 (1874)], thus many of the safeguards afforded accused criminals contained in the United States Constitution have been made applicable to disbarment proceedings. In Re Ruffalo, 390 U.S. 544; 20 L.Ed.117 (1968)

The Board in its Opinion of October 25, 1990 urged that dismissal is not "automatic". However, Petitioner did not seek "automatic dismissal" but indeed brought a timely motion for relief as required by law. Secondly, the Board took the position that compliance with MCR 9.111(B)(1) "would not be consistent with the goals of these proceedings". [See, Opinion, p.2, para.3] In short, such recitation

translated means that the inclusion of the 56 day rule is meaningless to an attorney-Petitioner, and the Michigan Supreme Court Rule did not mean what it pointedly stated. Further it is to be noted the dismissal of ADB 25-88 did not mean that the dismissal would be with prejudice.[17]

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[17] The Appellate Court held in Crane, supra, citing United States -vs- Richmond, 735 F. 2d.208, that Mr. Crane's conviction should be vacated and remanded to the U.S. District Court in Detroit for determination only of whether the dismissal requested by motion of Crane should be with or without prejudice.

In light of the 6th Circuit disposition of Crane's Speedy Trial Act claim, the appeals court declined to reach Crane's other assignments of error regarding the trial.

It is significant to note that in rendering its decision the appeals Court stated:

"We recognize the difficulty which the Speedy Trial Act creates for district judges and have no desire to make the life of a very able, diligent and effective federal trial judge like Judge Cohn even more difficult. On review we must, however, follow the law, even though in this instance its wisdom may be questionable. Congress has spoken on this issue, and there is no reasonable basis for finding that an exception is applicable. Commendably, Judge Cohn himself forthrightly recognized that the voir dire was an unacceptable method of escaping from the Congressional purpose expressed in the Act."

Fourth, the Petitioner was denied due process and a fair trial because (1) two separate and distinct actions were consolidated by the Secretary/Clerk to the Board, (2) the Panel and Board granted discovery to the Respondent-prosecution unavailable under the rules and exceeded the scope of their authority (3) the Board refused to provide access to the minutes and list of the Board in connection with their actions in selecting and appointing a Master, (4) the Board established a hybrid hearing format of an unprecedential nature wherein simultaneously a panel jointly made findings of fact and conclusions of law contrary to the clear mandates of MCR 9.110(D)(3) and MCR 9.115(G) itself which also denied equal protection of the law, and (5) procedural due process was also denied where the panel assigned never rendered a decision on the Petitioner's dispositive motions taken under advisement in its Order dated October 27, 1988. Dealing with each of the above subsidiary questions seriatim evinces the following correspond-

ingly.

Before a new hearing date was set to replace the April 29, 1988 hearing date previously set by the Board, which the Board on its own adjourned apparently, the Respondent on May 25, 1988 filed another Formal Complaint against the Petitioner which was assigned ADB No. 133-88 [hereinafter "Wright Matter"] that did not arise out of the same transaction and events, nor did each case depend upon substantially the same proofs in any sense. Further the Respondent made no motion to consolidate the matters. Moreover, less than one (1) day after the docketing of the Wright Matter with the Board (i.e. May 25, 1988, 10:30 A.M.), on May 26, 1988 at 10:02 A.M., a letter under the signature of the Board's Secretary/Clerk and Consolidation Notice of Hearing was received by the Petitioner. Both Formal Complaints was set for hearing on July 13, 1988.

First, in addressing this issue, there must be some due consideration as to what is the nature of these proceedings where a person

is being challenged as to his right to continue to pursue his professional life as an attorney in Michigan. In looking to Chapter 9, Professional Disciplinary Proceedings, Subchapter 9.100 et seq., for guidance MCR 9.115 (A) states, in part material, as follows:

> "(A) Rules Applicable. Except as otherwise provided in these rules, the rules governing practice and procedure in a nonjury civil action apply to a proceeding before a hearing panel."

The Board's action in consolidating these two separate proceedings resulted in the merging of two actions into one, and was not limited to an Order directing they be tried together. Support for the latter contention is apparent since the cases did not arise out of the same transaction nor depended upon substantially the same proofs. Likewise, a reference to the distinction between consolidation of two or more actions, and ordering them tried together is sufficient in and of itself to show the action of the consolidation was improper.

Moreover, in the instant case "consoli-

dation" within the context used in this proceeding is where several actions are combined into one and lose their separate identity and become a single action in which a single adjudication was rendered and discipline imposed by Panel #11 by "stacking". For example, but not without limitation, the loss of the two Formal Complaints' separate identities and their becoming one action is manifested in Report of Wayne County Hearing Panel #11 itself under the section designated as Report On Discipline, pages 3-4, which, in its pertinent part, pointedly states:

> "..., the facts and circumstances in this case lead inescapably to the conclusion that the Petitioner's license to practice law in Michigan should be revoked." [Emphasis Supplied]

Thus, it is obvious and plain by the foregoing quoted passage of Panel #11 that they treated these separate and distinct Formal Complaints as a single action in which a single adjudication was rendered by the inclusion of the words "in this case" in their imposition of discipline of revocation. Put an-

other way, there has been no entry of separate adjudications on each Formal Complaint evidencing that the several actions tried together but each retained its separate character. Consequently, different actions cannot be consolidated unless between the same parties and involving the same subject-matter, issues and defenses. See, 1 Corpus Juris, 1124, 1127; Johnson -vs- Manhatten Ry Co., 289 U.S. 479, 496-497; 77 L.Ed. 1331 (1933)

The standard for consolidation is not quite as broad as the scope of permissive joiner of actions and parties, as a consequence of which there are claims which may be permissively joined which cannot be consolidated if sued upon separately. See, and Compare, MCR 2.505(A) and MCR 2.203(B). Clearly Formal Complaint, ADB No. 133-88 was made the subject of a separate action therefore it cannot be consolidated with the other unrelated action pending between the same parties under MCR 2.505.

In United States -vs- Boscia, 573 F.2d.

827, 883 (3rd Cir., 1978) the Court stated:

> "Of course, no Defendant should ever be deprived of a fair trial because it is easier or more economical for the government to try several Defendants in one trial rather than in protracted multiple trials. The goal of the judicial process is not to decide cases as quickly and as inexpensively as possible." [Emphasis Added]

Further, even if different transactions violate the same substantive code, enactment or Court rule, or include a common Defendant, nevertheless consolidation should be denied. United States -vs- Kaplan, 588 F.2d.71, 74 (4th Cir., 1978); United States -vs- Nettles, 570 F.2d.547, 552 (5th Cir.1978); United States -vs- Martin, F.2d.849, 853 (9th Cir. 1977). This is true even if all counts of the two (2) complaints include a common Defendant. See, also, United States -vs- Hatcher, 680 F.2d.438 (6th Cir., 1982).

It is clear that an accused has the right not to be tried at one time for two separate and distinct offenses arising out of substantially different transactions. This is true even where two different transactions violate

the same statute. People -vs- Donaldson, 65 Mich App 588 (1975)

Put simply, a Judge does not have the discretion to join for trial separate offenses committed at different times. See, and compare, People -vs- Tobey, 401 Mich 141 (1977)

Likewise, Petitioner respectfully contends that MCR 9.110(D)(3) expressly proscribes the practice of appointing both a panel and a master to "receive evidence and make written findings of fact", and the like. See, MCR 9.111(B). Likewise, the statutory or rule-making scheme does not provide for such joint hearing process, i.e. jointly before the Master and at the same time before the Panel. Hence, due process itself is wanting under such procedure prescribed by the Board in its Order Appointing A Master, and denies, also, the Petitioner equal protection of the law.

More specifically MCR 9.110(D)(3), by the use of the word "**or**" therein, and being in the disjunctive, clearly does not evince the power

(i.e. jurisdiction) to "assign" Formal Complaints to both a Panel and a Master at the same time. Moreover, the Board only has jurisdiction (i.e. power) to "assign it to a hearing panel or to a Master". MCR 9.110(D)(3) [Emphasis Added] If the Michigan Supreme Court under its rule-making authority had intended that both a panel and a Master be jointly appointed and assigned, it would have said so. Put simply, if the Michigan Supreme Court wanted or intended that the Board had jurisdiction/power to appoint and assign both "on the filing of a Complaint", it would have used the conjunctive word "and" and not the disjunctive "or" in Rule 9.110(D)(3).

Therefore, once the Board, in the exercise of its power under MCR 9.110(D)(3), had "assigned it (the Complaints) to a hearing panel", coupled with the assigned panel having "receive(d) evidence and (made) findings of fact" under both Rule 9.111(B) and Rule 9.115 (F)-(G), and caused the issuance of various adjudications as an outgrowth, it is clear

error of constitutional proportions for the Board to delegate Panel #11 duties prescribed under Rule 9.111(A) and (B) to a Master while Panel #11 was still in place and making decisions and rulings.

To further amplify the reasons for the allowance of certiorari is the Board in its findings of fact under Count III of the Formal Complaint 133-88 held:

> "1. Ronald Karp, an attorney, was appointed by the Attorney Grievance Commission to serve as a Volunteer Investigator regarding a Grievance filed by Shirley Wright against Petitioner.
>
> 2. As part of his duties, Karp interviewed Petitioner in April of 1987.
>
> 3. Karp prepared a Report embracing his findings, but the document was not introduced as an exhibit at the hearing.[18] [Emphasis Added]
>
> 4. Respondent advised Karp that he retained all of the proceeds derived from the judgement in cash, as Wright's request.

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[18] This is absolutely not true. See pointedly Prosecution's Exhibit #56 dated July 10, 1989 at page 183 of transcript of the proceedings and record used to impose punishment. Totally hearsay evidence placed in the record without being excised as ordered by the Master.

5. Since Shirley Wright did not testify, it cannot be shown that Petitioner falsely informed Investigator Karp that Wright asked him to hold the funds in cash in order to avoid a garnishment.

6. Respondent falsely reported to Investigator Karp that he held the proceeds derived from the cashier's check of September 16, 1981, in cash. The testimony of Mary Sanders and the exhibits related to the transactions of September 16, 1981, along with other bank exhibits, reveal that Petitioner deposited $6,412.87 of the $7,428.87 in two accounts, receiving the remainder in cash. Subsequent to that transaction, he withdrew all but $198.02 from his trust account. Thus, Petitioner did not keep the proceeds of the garnishment check at his office, as he represented to Karp.

CONCLUSION: Respondent [Petitioner] committed professional misconduct by knowingly providing false information to a Volunteer Investigator of the Attorney Grievance Commission who was investigating a grievance filed against Respondent."

Moreover, the Board in its conclusion of law under Count III of Formal Complaint #133-88 found improvidently that "Respondent [Petitioner] committed professional misconduct in the following manner:

"3. By knowingly providing false information to a Volunteer Investigator assigned by the Attorney Grievance Commission to investigate a grievance filed against Respondent, in violation of DR

1-102(A)(4-5) and MCR 9.103(3)(4)(6).[19]

In sum, the Prosecution failed to prove or sustain a finding of misrepresentation under Count III. Prosecution had to prove each of the six (6) following elements:

> "(1) That defendant made a material representation; (2) that it was false; (3) that when he made it he knew that it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that he made it with the intention that it should be acted upon by plaintiff; (5) that plaintiff acted in reliance upon it; and (6) that he thereby suffered injury. Each of these facts must be proved with a reasonable degree of certainty, and all of them must be found to exist; the absence of any one of them is fatal to a recovery." Hi-Way Motor Company -vs- International Harvester Company, 398 Mich 330; 336; 247 NW2d 813 (1976), quoting Candler -vs- Heigho, 208 Mich 115, 121; 175 NW 141 (1919).

There was absolutely no showing by the Prosecution, through Mr. Karp or otherwise competent and admissible evidence in the record, that the Investigator or the Commis-

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[19] It must be noted that no MCR 9.103(3)(4)(6) violation was alleged in the Board's Formal Complaint, but nevertheless the Petitioner was found guilty of such rule contrary to the clear due process decision rendered by the United States Supreme Court in The Matter of Ruffalo, Jr., supra. Such rule does not exist.

sion actually relied to their detriment on the statements of Petitioner on the "misrepresentation". See, similarly, Smart -vs- New Hampshire Insurance Company, 148 Mich App 724 (1985)

Lastly, Panel #11 and the Board committed reversible error wherein it mandated revocation and three (3) years suspension respectively of the Petitioner's herein license to practice law because, given the Petitioner's twenty-one (21) years, when compared to similarly situated attorneys, the imposition of the penalty of even three (3) years is cruel and unusual, and not supported by record or prior decisions. Such penalty violates the Michigan and United States Constitutions when applied. The imposition is violative of the Petitioner's due process right and creates disparity in penalties imposed on other attorneys similarly situated.

In the instant case the Board in reducing the imposed punishment of the Petitioner's noted the otherwise unmarred practice of law

for twenty-one (21) years, save a reprimand in 1978 which even Panel #11 found "sufficiently remote in time that it has virtually no aggravating effect". [See, Board's Opinion, October 25, 1990, page 3, para.3]

For example, but without limitation, violation of restraining order of a trial Court enjoining the transfer of property has only resulted in an attorney being reprimanded. See, In The Matter Of Donald E. Bacon, P28933, Reported January 1988, Vol. 67, No. 1 of Michigan Bar Journal. With respect to false statements in a Court proceeding. See, In Re Booker T. Gaulden, P13878, June 1979, Vol. 56, No. 6 [120 days suspension]; In Re William L. Fischel, P22866, June 1989, Vol. 68, No. 6 [Reprimand]; In Re John Devers, Jr., P12716, March 1988, Vol. 67, No.3 [Reprimand]; In Re Melvin Turner, P273336, December 1987, Vol. 66, No. 12 [150 day suspension]; In Re Robert O. Lindow, P16698, December 1985, Vol. 64, No. 12 [75 day suspension]; In Re Robert R. Jacobsen, P15407, October 1985, Vol. 64, No.

10 [121 day suspension]; In Re Michael L. Oesterle, P27189, October 1985, Vol. 64, No. 10 [121 day suspension]; In Re Bary E. Solomon, P20772, March 1979, Vol. 58, No.3 [30 day suspension] With respect to mishandling of client funds. See, Phillip J. Tocco, P21484, November 1982, Vol. 61, No. 11 [60 day suspension]; In Re Mark H. Teklinski, P21319, December 1985, Vol. 64, No. 12 [Reprimand]; In Re Albert A. Chappell, P24900, October 1980, Vol. 59, No. 10 [Reprimand]; In Re Jacob Heffner, P14820, September 1985, Vol. 64, No. 9 [Reprimand]; In Re Kevin J. Henze, P34801, July 1989, Vol. 68, No. 7 [120 day suspension]; In Re Michael E. Thomas, P25798, May 1989, Vol. 68, No. 5 [60 day suspension]. With respect to excessive fees. See, In Re C. Michael Gorte, P14213, November 1982, Vol. 61, No. 11 [Reprimand]; In Re Robert E. Kostin, P16168, July 1989, Vol. 68, No. 7 [Reprimand]; In Re William J. Hayes, P14775, August 1989, Vol. 68, No. 8 [Reprimand]

A three (3) years suspension given the

comparative sampling research above, when coupled with the current punishment being imposed on other attorneys recently evinces the cruel and unusual imposition of penalty leveled against the Petitioner.[20]

In sum, it is respectfully submitted that the Michigan Supreme Court, acting through its established Attorney Discipline Road, has decided federal questions in a manner which conflict with not only other State Courts of last resort, but Federal Court of Appeals as is more in particular set forth above, and as supplemented in Petitioner's Appendix in accordance with Sup.Ct.R.14.1 (h). Likewise, the Michigan Supreme Court has decided important questions of federal law which has not been,

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[20] Effective June 22, 1991 the Board imposed only a six (6) month suspension against a White attorney Edward N. Rapoport (P26698). Mr. Rapoport not only neglected all six cases he was retained to represent, but also received fees in a Probate case [i.e. estate], without first obtaining Court approval. Mr. Rapoport additionally failed to answer the Formal Complaints and failed to appear at hearing and was defaulted. Costs were assessed at only $319.50.

but should be, settled by this Honorable Court, or has decided federal questions in ways which conflict with applicable decisions of this Honorable Court.

The nature of the disciplinary proceedings have been stated this way:

> "The power [to disbar], however, is not an arbitrary and despotic one, to be exercised at the pleasure of the court, or from passion, prejudice, or personal hostility; but it is the duty of the court to exercise and regulate it by a sound and just judicial discretion, whereby the rights and independence of the bar may be as scrupulously guarded and maintained by the Court, as the rights and dignity of the court itself." [Emphasis Added] [Ex Parte Secombe, 19 How. 9, 13 (1856)

Thus, a citizen who becomes an attorney and enters such public service cannot be forced to sacrifice his civil rights. As was referred in somewhat different factual setting wherein discipline imposed by the state of license to practive law; in concluding that the denial deprived the attorney of due process of law, the Court noted:

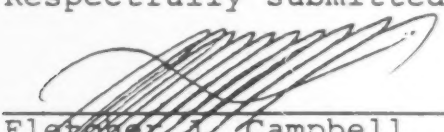
> "We need not enter into a discussion whether the practice of law is a "right" or "privilege". Regardless of how the

> State' grant of permission to engage in this occupation is characterized, it is sufficient to say that a person cannot be prevented from practicing except for valid reasons. Certainly, the practice of law is not a matter of the State's grace." 353 U.S. at p.239. [Emphasis Added]

See, Schware -vs- Board of Bar Examiners, 353 U.S. 232 (1957)

For the foregoing reasons, it is urged that the Petition For Writ of Certiorari be allowed.

Respectfully submitted,



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